the corporation liable." In the state of Maine the clause in their statute relative to insurance has been applied in the construction of the statute, so as to restrict its operation to such property, real or personal, as has some permanent location along the route of the railroad, because, as they say, it would otherwise be impracticable to obtain insurance; but as we have seen, the courts of that state find no difficulty at all in extending the statute to fences and growing trees. *Chapman* v. *Rd.*, and *Pratt* v. *Rd.*, before referred to.

For the foregoing reasons we conclude that there was no error in the judgment complained of.

In this opinion the other judges concurred.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
SUPREME COURT OF FLORIDA.[2]
COURT OF APPEALS OF KENTUCKY.[3]
SUPREME COURT OF NORTH CAROLINA.[4]
COURT OF ERRORS AND APPEALS OF NEW JERSEY.[5]
SUPREME COURT OF PENNSYLVANIA.[6]
SUPREME COURT OF WISCONSIN.[7]

Banks and Banking.

Creditors' Bill—Right to Participate in Fund.—Where, upon the pretended organization of a bank, a person allowed himself to be held out as president, and after the failure of the bank, he was sued by one of the depositors of the pretended bank, for the amount of his deposit, and a recovery had against him, which he paid, such depositor cannot afterwards come in and prove his entire debt against the bank, in a proceeding instituted by its creditors for the purpose of distributing its assets in payment of its debts: *Dobson* v. *Simonton*, 95 N. C.

Director of Savings Bank—Liability—Bad Investments—Errors of Judgment—Allegation—Proof—Benefit of Director.—The defendant, who was a director and member of the finance committee of a savings bank, which afterwards became insolvent (and a receiver was appointed), having acted with the president in investing its funds on mortgage on real estate not worth at least double the amount of the sum invested

[1] From J. C. Bancroft Davis, Esq., Reporter; to appear in 120 U. S. Rep.
[2] From D. C. Wilson, Esq., Clerk; to appear in 22 or 23 Florida Rep.
[3] To appear in 83 or 84 Ky. Rep.
[4] From Hon. Theo. F. Davidson, Reporter; to appear in 95 N. C. Rep.
[5] To appear in 49 or 50 N. J. Law Rep.
[6] To appear in 114 or 115 Pa. St. Rep.
[7] To appear in 67 or 68 Wis. Rep.

above all encumbrances, against the prohibition in its charter, is chargeable with the loss on the investment: *Williams* v. *McDonald*, 49 or 50 N. C.

He is not chargeable for any mere error of judgment, or mistake in estimating the value of property, using reasonable and ordinary care: *Id.*

It is not essential to allege and prove that he acted fraudulently, or that he derived any benefit from the loan; it is sufficient to show that there was a culpable violation of duty as *quasi* trustee of the funds of the bank, by which loss was sustained: *Id.*

Certificate of Deposit Negotiable—Statute of Limitations—Book Account—Evidence.—A certificate of deposit issued by a banker in the ordinary form of such instruments is in substance and legal effect a negotiable promissory note: *Curran* v. *Witter*, 67 or 68 Wis.

The statute of limitations commences to run against a certificate of deposit from the date of its issuance, without the necessity of any demand of payment; *Id.*

A witness may properly testify that entries made by him in a book of account are correct, although he has no independent recollection of the transactions thus entered: *Id.*

Boundary.

Evidence—Declarations.—The declarations of deceased persons, who were disinterested at the time the declarations were made, in respect to the location of boundary lines and corners of land, are competent evidence to prove their location, if the deceased person had opportunity to be informed in respect thereto: *Bethea* v. *Byrd*, 95 N. C.

Such declarations are not evidence if the person making them is still alive, whether living in this state or not, nor if made by a person interested at the time of making them, nor if made *post litem motam*: *Id.*

The mere fact that the witness whose declarations it is sought to give in evidence, owned a tract of land adjoining that whose corners he pointed out, does not make him incompetent: *Id.*

Building and Saving Associations. See *Corporation.*

Commissions. See *Executors and Administrators.*

Contract.

Party Wall—Right to Use—Subsequent Purchaser without Notice.—One who has the right to use the wall of an adjoining property by agreement with the owner thereof, of which agreement the subsequent owner of such property has no knowledge or notice, has no right, as against such subsequent owner, to use said wall without compensation. *Appeal of Heimbach*, 114 or 115 Pa.

A. agreed with B., the owner of his adjoining premises, that he (A.) should have the right to the wall of B.'s property. This agreement was not recorded. Against this wall A. built a frame shop, fastening the rafters thereof to the brick wall with iron spikes, and on the front of the wall, from the top to the bottom, a four-inch board was nailed, and to that other boards were fastened, so that the building projected beyond B.'s property some two and a half feet. B.'s property was sold at sheriff's sale to C., who sold to D. A. afterwards took down the frame shop,

and was putting up a brick building, making use of the wall as a party-wall. *Held*, that, as against D., an innocent purchaser without notice of the encumbrance, he had no right to do so without compensation, and that the character of the wooden erection when D. bought was not sufficient to put him on notice: *Id.*

Legislative Grant to Supply Water.—On similar facts, with reference to the same corporate grant, *New Orleans Water Works Co.* v. *Rivers*, 115 U. S. 674, is affirmed to the point that a legislative grant of an exclusive right to supply water to a municipality and its inhabitants through pipes and mains laid in the public streets, and upon condition of the performance of the service by the grantee, is a grant of a franchise vested in the state, in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the Constitution of the United States against state legislation, and against provisions in state constitutions, to impair it: *St. Tammany Water Works* v. *New Orleans Water Works*, 120 U. S.

Corporations.

Building and Saving Association—Right of Stockholders.—Certain members of a building and savings association, who had borrowed from the association the full amount of their respective shares, securing the same by mortgages on real estate, met together and without authority of the charter or constitution, and without the consent of the other members, agreed among themselves that they would each pay up at once an amount equal to the dues occurring on their respective shares up to a certain date and no more, and that their mortgages should be cancelled by the association. The directors then in office accepted said payments and caused the several mortgages to be cancelled, and released them from any further obligation to pay their weekly contributions, thus practically dissolving the association. Certain of the members who have not borrowed from the association the amounts of their respective shares, and who did not consent to this arrangement, suing for themselves and other members of the same class, instituted this action, averring these facts and the further fact that there is yet due them on their shares a large balance. They pray for a dissolution of the association, a settlement of its affairs, a judgment against the defendants, &c.: *Held*, 1. Where a joint stock incorporated company is established for a definite purpose prescribed by its charter, not even the majority can make a valid appropriation of the funds of the corporation to a different purpose. Therefore, this action can be maintained. 2. As the common interest of the numerous stockholders is involved, the plaintiffs were properly allowed to sue for themselves and other stockholders having a like interest. 3. Though the defendants each owe several amounts, it is not necessary that a separate action should be instituted against each to recover what he may be owing. 4. The Statute of Limitations is not well pleaded. The averment that more than five years has elapsed since the accruing of plaintiff's claim is not sufficient. The averment should have been that more than five years had elapsed before the institution of the action. 5. All the delinquent stockholders should be before the court and their liabilities ascertained and determined. It was error to render judgment against only a part of the delinquent stockholders, thus compelling them to pay not only their *pro rata* of the sum necessary to equalize the

various stockholders, but the *pro rata* of the remaining debtors: *Arling* v. *Kenton Building and Savings Association*, 83 or 84 Ky.

Benefit Societies—Right of expelled Members—Mandamus.—Where a benefit society has provided the method for the expulsion of its members, the courts will not undertake to supervise its action by determining that its judgment of expulsion in a particular case was not in accordance with its by-laws, or was for causes that had no foundation in fact; but where the expelled member has appealed to a higher tribunal within the order, as provided by its rules, and that tribunal has reversed the decision of the inferior tribunal, and ordered it to restore the expelled members to all the privileges of the order, he will be treated by the courts as a member where his right to share in the funds of the society is involved, provided the appellate tribunal within the order is without power to enforce its order of restoration. The chancellor, however, cannot restore the expelled member to membership, or require that he shall be permitted to attend the stated meetings of the society: *Schmidt* v. *Abraham Lincoln Lodge*, 83 or 84 Ky.

Mandamus will not lie to compel the officers of a benefit society to restore an expelled member: *Id.*

Manufacturing Corporation issuing Negotiable Paper—Purchaser in Good Faith—Notice.—A corporation created for the purpose of carrying on a manufacturing business has implied power to make negotiable paper for use within the scope of its business, but no power to become a party to bills or notes for the accommodation of others: *Nat. Bank of Republic of New York* v. *Young*, 49 or 50 N. J.

When a corporation has power, under any circumstances, to issue negotiable paper, a *bona fide* holder has a right to presume that it was issued under the circumstances which give the requisite authority, and such paper is no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper: *Id.*

Notice of facts such as would put a prudent person upon inquiry, which inquiry, if pursued, would have disclosed the infirmity of the paper, is not sufficient to impeach the title of the holder of negotiable paper taken for value before maturity, so as to let in defences to which the paper would be subject in the hands of the original party: *Id.*

The right of such a holder to recover can be defeated only by proof of such circumstances as show that he took the paper with knowledge of some infirmity in it, or with such suspicion with regard to its validity as that his conduct in taking it was fraudulent: *Id.*

Dedication.

Camp Ground on Sea-shore—Erection of Buildings on—Injunction.—The defendant, a religious camp-meeting association, having laid out and mapped its sea-side property into lots, reserving a tier of blocks, extending from the ocean westward, as a camp-ground for religious services and tenting purposes, and having sold to the complainant lots by this map fronting on the blocks so reserved, whereon he erected a summer residence, *held*, that the association had thereby entered into an implied covenant with the complainant that these blocks should be devoted to the uses indicated, and that it had no right to divide these blocks into lots for the purpose of leasing them for a term of years with

the privilege of erecting thereon permanent cottages: *Sennig* v. *Ocean City Assoc.*, 49 or 50 N. J.

Dower.

In Mines.—Whether or not dower may be had in mines that have not been opened, it is well settled that as to mines that have been opened the widow is entitled to dower. In this case land was allotted to the widow as dower under which a mine was operated, with an entrance upon the lands of another, but the mine was not valued as a mine in allotting dower. *Held*, That while the widow will not be allowed to go upon the land of another to reach the entrance to the mine, she may operate the mine by making an entrance on the dower tract, and may take therefrom so much of the coal as may be necessary for the use of the farm as fuel, and may sell so much as may be required to keep the dower tract in repair: *Whittaker* v. *Lindley*, 83 or 84 Ky.

Election.

Mandamus—Scratched Ballot.—In canvassing the votes cast at an election the inspectors refused to count a certain ballot for the relator, because his name as it appeared thereon was scratched. The marks over the name were such as to call for an exercise of judgment by the inspectors as to whether it had been scratched, or it was the intention of the person casting it to vote for the relator. *Held*, that this exercise of judgment by the inspectors could not be controlled by mandamus: *State ex rel. Lilienthal* v. *Deane*, 22 or 23 Fla.

Equity.

Jurisdiction — Remedy at Law.— Equitable jurisdiction does not depend on the want of a common-law remedy; for, while there may be such a remedy, it may be inadequate to meet all the requirements of a given case, or to effect complete justice between the contending parties. Hence the exercise of chancery powers must often depend on the sound discretion of the court: *Appeal of Brush Electric Co.*, 114 or 115 Pa.

Estoppel. See *Landlord and Tenant.*

Evidence. See *Banks and Banking—Boundary.*

Executors and Administrators.

Commissions—Trustee.—If a person be appointed in a will an executor and trustee, such person is entitled to commissions, calculated on the *corpus* of the estate, in each capacity, at such rate as will yield a reasonable compensation for the service in each of such respective offices: *Pitney* v. *Everson*, 49 or 50 N. J.

Injunction. See *Dedication; Street.*

Insurance.

Application for—Answers — Warranties —Representations— Waiver — Variance.—Answers to questions propounded by insurers in an application for life insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties, to

be strictly complied with, are to be construed as representations, as to which substantial truth in everything material to the risk is all that is required of the applicant: *Phœnix Life Ins. Co.* v. *Raddin*, 120 U. S.

Where, upon the face of an application for life insurance, a direct question of the insurers appears to be not answered at all, or to be imperfectly answered, the issue of the policy without further inquiry, is a waiver of the want or imperfection of the answer, and renders the omission to answer more fully immaterial: *Id.*

A policy of life insurance stated that it was issued and accepted by the assured upon certain express conditions, one of which was that "if any of the declarations or statements made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, this policy shall be null and void." The application contained a number of printed questions "to be answered by the person whose life is proposed to be insured," and "declared that the above are fair and true answers to the foregoing questions," and that it was agreed by the applicant "that this application shall form the basis of the contract for insurance," "and that any untrue or fraudulent answers, or any suppression of facts," should avoid the policy. One of these questions was: "Has any application been made to this or any other company for assurance on the life of the party? If so, with what result? What amounts are now assured on the life of the party, and in what companies?" To this question the applicant answered "$10,000, Equitable Life Assurance Society." A policy of that society was in fact the only other existing insurance. *Held*, that the answers were not warranties, but representations; and that the issue of the policy, without further inquiry, was a waiver of the right of the insurers to require further answers as to the particulars mentioned in this question, and estopped them to set up that the omission, though intentional, to disclose unsuccessful applications for additional insurance was material and avoided the policy: *Id.*

A bill of exceptions should not contain the whole charge of the court to the jury, but should only state distinctly the several matters of law excepted to: *Id.*

A bill of exceptions cannot be sustained to an instruction or to a refusal to instruct in matter of law, without showing that there was evidence to which the instruction given or refused was applicable: *Id.*

The acceptance by insurers of payment of a premium, after they know that there has been a breach of a condition of the policy, is a waiver of the right to avoid the policy for that breach: *Id.*

Where the declaration in an action on a policy of insurance alleges that the consideration of the contract was the payment of a certain premium at once, and of future annual premiums, and the policy given in evidence is expressed to be made "in consideration of the representations made in the application of this policy," and of the sums paid and to be paid for premiums, and the application contains no promise or agreement of the assured, there is no variance: *Id.*

JURY.

Statute—Peremptory Challenges.—A statute of a state which provides that in capital cases, in cities having a population of over 100,000 inhabitants, the state shall be allowed fifteen peremptory challenges to

jurors, while elsewhere in the state it is allowed in such cases only eight peremptory challenges, does not deny the equal protection of the laws to a person accused and tried for murder in a city containing over 100,000 inhabitants; and there was no error in refusing to limit the states peremptory challenges to eight: *Hayes* v. *Missouri*, 120 U. S.

LANDLORD AND TENANT.

Estoppel—When Tenant may dispute Landlord's Title—Fraud—Mistake.—While a tenant cannot be permitted to controvert the title of his landlord under whom he entered into possession, yet if one in possession under claim of title is induced to accept a lease through misrepresentation, fraud, or trick of the lessor, he is not estopped from setting up a title superior to that of his lessor. So, if the lease be made through mutual mistake of the facts by both parties, the lessee is not estopped from setting up a superior title, if he was in possession when he executed the lease: *Berridge* v. *Glassey*, 114 or 115 Pa.

MANDAMUS. See *Corporation; Election.*

NATURAL GAS COMPANIES.

Power of Councils—Regulations of laying Pipes and Lines—Pennsylvania Act of May 29th 1885.—Under the Pennsylvania Act of May 29th 1885 (P. L. 29), natural gas companies are invested with the right of eminent domain, and all other powers and privileges necessary to the convenient and successful prosecution of their business. Such companies are subject, also, to the assent of the city councils to the laying of their pipes and lines, and to such regulations as the councils may adopt. When councils have given their assent, the regulations they are authorized to adopt are such only as relate to the manner of laying pipes, altering, inspecting and repairing the same, and the character thereof with respect to safety and public convenience; and these regulations must also be reasonable, and not in conflict with any of the provisions of the act: *Appeal of City of Pittsburgh*, 114 or 115 Pa.

NOTICE. See *Corporation.*

NUISANCE. See *Street.*

OBLIGATION.

Time of Essence of Contract—Waiver.—Where an obligation for the payment of borrowed money, without security, provides for its payment in monthly instalments, and further provides that, upon default in the payment of any instalment, the whole debt shall become due, time is of the essence of the contract, and a failure to pay any instalment when due gives the creditor the right to demand and receive the whole debt; and any waiver of the default, to be binding, must be by agreement, upon a sufficient consideration. The mere acceptance by the creditor of a payment, upon the whole debt, of the amount of any unpaid monthly instalment as to which the debtor is in default, does not authorize the presumption of a waiver, by the creditor, of the default, there being no equity in favor of the debtor to authorize such a presumption: *Bishop* v. *Lawrence*, 83 or 84 Ky.

OFFICE.

Person holding two Offices.—A clerk in the office of the President of the United States, who is also appointed to be the clerk of a committee of Congress, and who performs the duties of both positions, is entitled to receive the compensation appropriated and allowed by law for each: *United States* v. *Saunders*, 120 U. S.

Sections 1763, 1764 and 1765 of the Revised Statutes have no application to the case of two distinct offices, places or employments, each with its own duties and compensation, but both held by one person at the same time: *Id.*

PARTY WALL. See *Contract.*

RAILROADS. See *Street.*

Fences—Negligence.—There is no requirement at common law, and no statute in the state, obliging railroad companies to fence their tracks. So, where in constructing a railroad, a portion of the plaintiff's pasture fence was removed, and a cut about eight feet deep was made where the fence had been, into which the plaintiff's horse fell and was killed, it was *held*, that the railroad company was not liable: *Jones* v. *Western N. C. Rd.*, 95 N. C.

Train not stopping at Point for which Ticket is bought—Action—Damages—Waiver.—When a passenger goes on the train of a railroad company and pays his fare to be transported to some locality on such company's road, and the conductor, before the journey is completed, tells the passenger that the train will not go to the station to which such passenger has paid to be carried, and that he can either get off at the station where the train is then stopping, or go to some other point, whereupon the passenger leaves the train, he has a right of action against the company for damages. But, if after the passenger leaves the train, the conductor tenders him back the fare for the uncompleted part of his journey, and he voluntarily receives it, he thereby waives his right of action: *Florida Southern Ry.* v. *Katz*, 22 or 23 Fla.

Carriers of Passengers—Ticket Agent, authority of—Duty of Railroads to honor Ticket—Stop-over—Ejecting Passenger.—When a railroad ticket has been purchased in good faith from an agent acting within the general scope of his employment, it is the duty of the several companies named therein to honor it until it is used, or expires by its own limitation. *Young* v. *Penna. Rd.*, 114 or 115 Pa.

A. purchased a ticket at Akron, Ohio, for Philadelphia, Pennsylvania, and was informed by the ticket agent that the ticket was good for six days, and would permit A. to stop off. A. accordingly used the ticket to Montandon Junction, where, having purchased a local ticket, he proceeded to another point, and then returned to Montandon, and thence to Sunbury, the terminus of one of the roads, over which a coupon attached to his ticket entitled him to ride. After leaving Sunbury, and while on the road to Harrisburg, over the road of B., operated by C., A. tendered his ticket to the conductor, who was the same as on the train from Montandon to Sunbury. The conductor refused the ticket, and ejected A. from the train. He afterwards boarded another train, and his ticket was accepted. He thereupon brought suit against C. for trespass: *Held*,

that C. was bound by the acts of its servants, the ticket agent acting within the scope of his authority, and the conductor employed on a road operated by it: *Id.*

STATUTE.

General—Local—Repeal by Implication.—It is a rule as to general statutes that while a later statute may repeal a former, without express language to that effect, by necessary implication, yet the leaning of the courts is strongly against such construction. But a local statute, enacted for a particular municipality, is intended to be exceptional, and for the benefit of such municipality, and it is against reason to suppose that the legislature, in framing a general system for the state, intended to repeal a special act which the local circumstances made necessary: *Malloy* v. *Reinhard*, 114 or 115 Pa.

STATUTE OF LIMITATIONS. See *Banks and Banking.*

STOCKHOLDERS. See *Corporation.*

STREET.

Abutting Owner—Railroad.—An owner of an estate abutting on a street or highway and owning the fee in the soil to the middle of the street, while the same is subjected to the use of the public for the ordinary requirements of travel on foot and by horses and vehicles, has such property in his portion of the street as will prevent the taking thereof, or any part of his side of said street, by the imposition of an additional burden on the soil to the usual requirements of travel, to wit: by the laying of a railroad track thereon and the operation thereof by steam, without first making just compensation therefor: *Florida Southern Ry.* v. *Brown*, 22 or 23 Fla.

Nuisance—Private—Market in Public Street—License by City—Injunction.—The whole of a public street in a city is for the use of the public at large; and the occupation of such street for a market, thereby obstructing the street, and disturbing the residents in the vicinity by noise and unpleasant odors, while it is a public nuisance, is also a private nuisance, in so far as it injuriously affects a resident in the vicinity; and such nuisance is not legalized by the fact that the city had granted a license for the use of the street for that purpose: *McDonald* v. *City of Newark*, 49 or 50 N. J.

A city granting licenses to use a public street as a market, thus creating a nuisance by disturbing the residents in the vicinity with foul odors and excessive noise, will be enjoined from using, or authorizing or taking pay for the use of, such street for that purpose: *Id.*

TELEGRAPH.

"Bucket Shop"—Refusal to furnish Communication to—Pleading.—The device known as a "bucket shop," which *purports* to be an actual deal in grain, but is *in fact* merely a wager on the market price of the commodity at some specified time in the future, is a species of gambling, and, therefore, illegal and contrary to public policy: *Smith* v. *Western Union Tel. Co.*, 83 or 84 Ky.

A telegraph company cannot be required to communicate a message

which is to furnish the means of carrying on an illegal business, whatever its motive in refusing to communicate the message. In this case the court refuses to require appellee to continue to furnish the appellant, the keeper of a "bucket shop," with the market quotations: *Id.*

Defendant having denied that plaintiff was a merchant, or that he was engaged in the grain business, under that denial it was competent to show that appellant was not a dealer in grain, but simply a gambler therein: *Id.*

TRUSTEE. See *Executors and Administrators.*

VARIANCE. See *Insurance.*

WAIVER. See *Insurance.*

WARRANTIES. See *Insurance.*

WATERS AND WATER-COURSES.

Navigable Waters—Entry and Grant—Riparian Owner—Relicted Land.—Land covered by navigable water is not the subject of entry and grant: *Hodges* v. *Williams*, 95 N. C.

By the common law the criterion whether a water was navigable was the ebb and flow of the tide, but this test has no application to the waters of this state, where the test is whether or not the water is navigable for sea vessels: *Id.*

A water way lying wholly within a state, and not connected with other waters leading to the sea, is not navigable under the laws of the United States: *Id.*

The riparian owner of land bordering on a river which is technically not navigable, but which is used as a highway of commerce, owns the land in the bed of the river, subject to an easement in the public to use the river for the purposes of transportation: *Id.*

A lake fifteen miles long and eight miles wide, which is three and one-half feet deep, and which has no important inlet, and does not form a link in a chain of water communication, is not navigable: *Id.*

The riparian owner of land on the bank of an unnavigable stream has no title *ad filum aquæ* if the state has granted the bed of the stream to another: *Id.*

Where the bed of an unnavigable stream has been granted, a riparian proprietor is not entitled to land made by a withdrawal of the waters: *Id.*

Where land is relicted by a sudden withdrawal of navigable waters it belongs to the sovereign, but where the withdrawal is gradual it belongs to the riparian proprietor: *Id.*